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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NATHALIE THUY VAN,

Plaintiff and Appellant,

v.

LANGUAGELINE SOLUTIONS,

Defendant and Respondent.

H045193

(Santa Clara County

Super. Ct. No. 1-13-CV-244291)

In this employment dispute, plaintiff was sanctioned \$7,713 for discovery violations relating to her failure to appear for deposition. The order was reversed on appeal, and on remand the sanction was reimposed. For the reasons stated here, we will affirm.

I. BACKGROUND

A. PLAINTIFF’S OBJECTIONS AND APPLICATION TO STAY THE DEPOSITION

Defendant served plaintiff with a notice to take her deposition on June 12, 2014. Plaintiff objected on grounds that the notice violated Code of Civil Procedure section 2025.250, subdivision (a), which requires an out-of-county deposition to be set within 75 miles from a person’s residence absent a court exception. Plaintiff further objected that defendant had failed to produce documents she needed to prepare for the deposition, and noted that her motion to compel production (filed that day) would be heard in July. Defendant served an amended deposition notice moving the date to

June 19. Plaintiff responded by repeating her objections and informing defendant that on June 3 she would apply ex parte to stay the deposition.

Plaintiff asked the trial court to stay the June 19 deposition until her motion to compel discovery could be resolved and the parties could engage in mediation. As good cause, plaintiff alleged that the parties were willing to mediate after the deposition, the discovery matter would not be resolved until the motion to compel was heard in July, and the deposition was set out of county and more than 75 miles travel distance from her home in violation of section 2025.250, subdivision (a) (undesigned statutory references are to the Code of Civil Procedure). The application was filed and denied without findings on June 3.

Two days later, plaintiff served objections to the amended deposition notice repeating the grounds set forth in her earlier objections and ex parte application. She also informed defendant she “will not appear [at] the June 19 and 20 deposition or any deposition” until her motion to compel was heard and “all parties have complied with the order of the Court.” The following week plaintiff served supplemental objections to the amended deposition notice identical to those served the previous week, adding that she “will not be available” for the June 19 deposition. Defendant’s attorney traveled to and appeared for the deposition on June 19. Plaintiff did not attend.

Defendant served plaintiff with a second amended deposition notice resetting the deposition for July 28. That notice was met with the same objections made earlier, with the additional objection that defendant had “not produced all responsive documents as ordered” on July 10. (According to the order after hearing on plaintiff’s motion to compel, the motion was heard on July 10 and continued to July 25, with the court instructing the parties on July 10 to meet and confer regarding a protective order.) Plaintiff also informed defendant that she was “unwilling to appear” at the July 28 deposition.

Defendant served a third amended deposition notice on July 25, moving plaintiff's deposition to August 28. Plaintiff served defendant with objections to the third amended notice identical to those directed to the second amended notice, adding that "[p]laintiff is unwilling to appear" at the August 28 deposition.

B. DEFENDANT'S MOTION FOR SANCTIONS

On July 28 defendant moved for costs and attorney's fees related to plaintiff's failed ex parte application as discovery sanctions under section 2025.410, subdivision (d) (mandatory sanctions on a party "who unsuccessfully makes or opposes a motion to quash a deposition notice" absent justification) and section 2023.030, subdivision (a) (sanctions for misusing the discovery process). Defendant also sought sanctions under section 2023.030, subdivision (a) and section 2025.450, subdivision (g)(1) for disobeying a court order and failing to appear at the June 19 deposition, and contempt sanctions under section 2023.030, subdivision (e) for plaintiff's willful disobedience. Defendant sought terminating sanctions under section 2023.030, subdivision (d) for plaintiff's abuse of discovery and contempt of court, or in the alternative an order compelling plaintiff to appear for her deposition.

After a hearing attended by both parties, the trial court granted defendant's motion by written order filed on September 5, 2016. The trial court found that plaintiff had not acted with substantial justification in applying to stay the June 19 deposition, and awarded \$1,050 in attorney's fees related to that request as a sanction. Regarding plaintiff's nonappearance at the June 19 deposition, the court found plaintiff had failed to submit to an authorized method of discovery, disobeyed a court order to provide discovery, and failed to comply with a deposition notice. It awarded defendant \$7,713 in attorney's fees for counsel's appearance at the deposition and preparation of the sanctions motion. (Defendant's request for terminating sanctions or an order compelling plaintiff

to attend her deposition was continued to the time set for plaintiff's motion to quash the third amended deposition notice.)

C. PLAINTIFF'S FIRST APPEAL

Plaintiff appealed the September 5 order. This court upheld the \$1,050 sanctions award for plaintiff's unsuccessful ex parte application. (*Van v. LanguageLine Solutions* (2017) 8 Cal.App.5th 73, 83 (*Van I.*) Regarding defendant's request for sanctions flowing from events following the denial of the stay application, we concluded that by granting defendant's motion which asked for a " 'contempt sanction' " and referred to plaintiff's " 'direct defiance' " of the June 3 order, the trial court had treated the discovery violations as a contempt of court. (*Id.* at p. 80.) We annulled the order insofar as it found plaintiff in contempt for violating the June 3 order because the latter had not compelled her deposition attendance. (*Id.* at p. 82.) We also reversed the order insofar as it sanctioned plaintiff \$7,713 for disobeying a court order because "it is an abuse of discretion to sanction a party for disobeying an order which neither compelled nor prohibited any action." (*Ibid.*) Acknowledging that defendant had raised other discovery violations, we remanded the matter to the trial court for recalculation as it had not delineated the behavior underlying the award. (*Id.* at p. 82.)

D. THE TRIAL COURT'S DECISION ON REMAND

On remand and after additional briefing by the parties, the trial court reimposed the original sanctions award of \$7,713 by written order filed on August 31, 2017. The trial court explained that the original findings (that plaintiff had refused to comply with a valid deposition notice until her motion to compel was resolved, and that she had claimed unavailability for dates she had confirmed her availability for work) constituted misuse of the discovery process under section 2023.010, subdivision (d) (failing to respond to or submit to an authorized method of discovery) and subdivision (e) (making an unmeritorious objection to discovery without substantial justification). The court noted

that the basis for the \$7,713 sanctions award was not disobedience of a court order or a contempt finding. Rather, it reflected a reduction of defendant's request for attorney's fees and costs related to plaintiff's nonappearance at a properly noticed deposition and preparation of the sanctions motion based on that nonappearance.

II. DISCUSSION

Under section 2023.030, subdivision (a), "[t]he court may impose monetary sanctions ordering that one engaged in the misuse of the discovery process ... pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." Conduct constituting "misuse of the discovery process" includes "[f]ailing to respond or to submit to an authorized method of discovery" (§ 2023.010, subd. (d)), and "[m]aking, without substantial justification, an unmeritorious objection to discovery" (*id.*, subd. (e)). If the court finds the sanctionable conduct was substantially justified, it may deny the request for monetary sanctions. (§ 2023.030, subd. (a).)

Sanctions for misuse of the discovery process are reviewed under the deferential abuse of discretion standard. (*Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1560.) " 'A court's decision to impose a particular sanction is "subject to reversal only for manifest abuse exceeding the bounds of reason." [Citation.]' [Citation.]" (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435.) The scope of our review necessarily encompasses the propriety of granting the sanction. (*Id.* at p. 1433.) We resolve any evidentiary conflicts in favor of the trial court's ruling, reversing only if the action was arbitrary, capricious, or whimsical. (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878.)

On appeal, plaintiff recasts her objections to the deposition notices as a basis for this court to reverse the reinstated sanctions award. She argues that defendant violated section 2025.250, subdivision (a) by noticing her deposition 80 miles driving distance from her home; engaged in oppressive conduct under section 2023.010, subdivision (c)

by noticing the deposition for Monterey and by filing the motion for sanctions; and did not make good faith efforts to informally resolve her travel concerns.

None of those arguments establishes an abuse of discretion in the August 31 order. Defendant noticed plaintiff's deposition for June 19; the trial court denied plaintiff's ex parte request to stay the deposition; plaintiff did not renew her substantive objections to the deposition in a properly filed motion under section 2025.410, subdivision (c) (motion to quash deposition notice) or section 2025.420, subdivisions (a) and (b)(4) (motion for protective order directing deposition be taken at a different location); and she ultimately failed to appear at the deposition. The trial court acted within its discretion to find that neither plaintiff's objections nor her notice of unavailability excused her from attending the deposition, and that her failure to attend the deposition was not substantially justified so as to come within the exception to sanctions under section 2023.030, subdivision (a).

Plaintiff argues in her reply brief that this court's remand required the trial court to address her mileage objection, and that the trial court erred by not doing so. While we observed in *Van I* that there had been "no determination as to whether [plaintiff] had a substantial justification for not attending her deposition or whether she had a valid objection to the various deposition notices served by [defendant]" (*Van I, supra*, 8 Cal.App.5th at p. 76), a trial court is not required to make express findings of the absence of substantial justification to excuse imposition of sanctions. (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 294 [a finding that substantial justification exception does not exist "is implied in the order awarding sanctions"].) The trial court found that plaintiff had failed to submit to an authorized method of discovery, and that her unilateral objections and notice of unavailability did not justify her nonappearance. The trial court's findings are supported by substantial evidence: Plaintiff did not present her objections to the trial court in a proper manner, she claimed unavailability despite confirming her availability to work (for defendant) on the same dates, and she did not appear for her deposition.

We understand the parties disagree as to whether the 75-mile restriction in section 2025.250, subdivision (a) is measured by actual road miles to be traveled or by a radial line emanating from a deponent's home. (The distance from plaintiff's Milpitas residence to the deposition set in Monterey is over 80 road miles, but only 60 miles "as the crow flies.") While plaintiff challenged the Monterey location on that basis in her ex parte application, the court's denial of her stay request did not necessarily encompass a ruling on the issue. An ex parte application requires a threshold showing of irreparable harm, immediate danger, or a statutory basis for granting ex parte relief. (Cal. Rules of Court, rule 3.1202(c).) No such showing was made here, nor could it be given that a properly filed motion to quash the deposition notice would have automatically stayed the deposition pending determination of the motion. (§ 2025.410, subd. (c).) Plaintiff did not properly raise the mileage objection to the trial court, and resolution of the question was not necessary given plaintiff's other conduct establishing discovery abuse. By upholding the sanctions order, we express no view regarding the mileage restriction or its scope.

Plaintiff's remaining arguments—that the trial court did not break down the award by expense or consider section 2023.010 in its entirety—do not demonstrate that imposition of sanctions was an abuse of discretion, and we therefore do not reach those issues.

III. DISPOSITION

The August 31, 2017 order is affirmed. Costs on appeal are awarded to respondent.

Respondent's motion for appellate sanctions is denied.

Grover, J.

WE CONCUR:

Elia, Acting P. J.

Danner, J.